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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 575

ISRAEL A. ABRAMS, ET AL., BERNARD SHULMAN AND MEYER ABRAMS,

Petitioners,

VS.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY AND MOTION.

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INDEX.

Summary of Reply.

Additional Cases Cited.

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HENRY A. SCANDRETT, WALTER J. CUMMINGS and GEORGE I. HAIGHT, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company,

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PETITIONERS' REPLY AND MOTION FOR LEAVE TO FILE COPY OF BRIEF AND PETITION FOR REHEARING FILED BELOW.

STATEMENT.

Respondents contend that certain issues were not raised below and are presented for the first time in the Petition for a Writ of Certiorari. For the purpose of showing the inaccuracy of their statement, we are moving for leave to

file a copy of Petitioners' Brief and Petition for Rehearing to demonstrate that the questions were raised below.

The statement (p. 9) that "The same record" so far as "evidence is concerned" was presented to this Court "then as now" and the Court "must have concluded that the points were not well taken" is refuted by the opinion on the former appeal (121 F. (2) 371). There, the Court said (R. 155):

> "The evidence upon which this finding was made was not before the District Court".

The evidence *was* before the District Court on *this hearing* as it appears in Respondents' marginal note on page 1. In order to supply such evidence on the previous application for the Writ of Certiorari, we moved in this Court for leave to file Volumes I and II which were filed below in Cases Numbers 7590, 7610-7617, but this Court *denied* the motion. *These volumes are now part of this record* by the stipulation of the parties and by the order of the Court.

The contention (p. 9) that the point that the Report of the Commission lacked basic findings "is presented for the first time in the petition for certiorari" will be demonstrated to be false in the answer to the "argument" and by the motion for leave to file the Brief and the Petition for Rehearing which was filed below.

I.

This Is a Proper Case for Review By Certiorari.

The point that no proper case was presented for review by certiorari is based on the contention that a Writ is *discretionary* and not a matter of *right*. There is no controversy as to this point. In addition to the reasons urged in the Petition for the exercise of discretion to issue the Writ, counsel's contention (p. 12) that Rule 52

(a) is inapplicable to reports of Commissions is the *strongest reason* for the issuance of the Writ. In these days when many of the judicial functions are being performed by quasi-administrative commissions or bureaus, *the application of Rule* 52 (a) *to findings of such commissions becomes of extreme importance.* It is in the interest of the public that this Rule be made applicable to such commissions. This would seem to be in line with the most recent decision of this Court of January 3, 1944, in *City of Yonkers* v. *Int. Com. Com.*, 64 S. Ct. 327, as to the *jurisdictional basic findings* on the part of commissions. There, Mr. Justice Douglas, in speaking on behalf of this Court, said (p. 330):

> "And the fact that the Commission fails to make a finding * * * does not preclude the reviewing Court from making that determination initially. But we deem it essential * * * for the Court to decline to make that determination without basic jurisdictional finding first having been made by the Commission."

This Court reversed the Commission because of its failure to make basic findings.

II.

Lack of Basic Findings.

Being in no position to justify the report of the Commission which *lacked basic jurisdictional findings,* Respondents resort to the contention (p. 11) that "for the first time Petitioners urge the contention that the Commission's report fixing maximum limits does not contain sufficient findings". To demonstrate the falsity of this contention, we are moving for leave to file instanter a copy of Appellants' Brief and Petition for Rehearing which was filed below. We direct the attention of this Court to Sub-paragraph (b) of Point I, under "Propositions of Law", at page 9 of the Brief, to the discussion

thereof at page 14, and to the argument contained at page 15 of the Petition for Rehearing.

The contention (p. 12) that Rule 52 (a) is inapplicable "to Commission findings" on the theory that the Rule applies only to "all suits of a civil nature at law or in equity", and not to Commission reports, is completely without merit for the reason that this Court has held that the Rule is applicable to bankruptcy (*Kelly* v. *Everglades Drainage District*, 319 U. S. 415-418) and the Commission's report was filed in a bankruptcy proceeding. *The Writ should be issued to decide this important question in Federal administration.*

In *City of Yonkers* v. *U. S. and Interstate Commerce Commission*, 64 S. Ct. 327, this Court referred to *Florida* v. *U. S.*, 382 U. S. 194, which was cited in our petition in support of the point that a report of a commission without basic findings cannot be sustained, and it said (p. 330):

> "In that case this Court set aside the order of the Commission because of 'lack of basic and essential findings required to support the Commission's order' ".

The question whether the Commission made basic findings and whether the Court made such basic findings is fully discussed under Point I in the Petition (pp. 16-19) and under Point II (pp. 19-48). Contrary to the contentions of Respondents, a reading of the opinion in the instant case as compared with the decision of the Court of Appeals for the District of Columbia in *National Savings & Trust Company* v. *Shutack*, will show that the two decisions cannot be reconciled on the application of Rule 52 (a), and the Writ should be issued to reconcile the two conflicting decisions.

III.

The Record Does Not Support the Judgment Below.

We challenged the Respondents to point to anything in the record which tends to support the conclusion that

there is substantial evidence to sustain the report. The following is their answer to the challenge (p. 19):

> "It could hardly be expected that the record should disclose direct testimony from a witness to the effect that what the Petitioners did was of no benefit and that is the type of evidence that Petitioners seem to think should appear in order to support the finding of the Commission".

This statement should be considered as a *confession* that there is no such evidence. Why it could not be expected that there should be evidence on the point that Petitioners' services were of no benefit is not explained. Respondents could have offered such evidence if they had any, which they now admit that they did not.

In a further effort to meet the challenge they say (p. 19):

> "What the record does show, and shows with clarity, is that the class of bondholders in which the Petitioners belong was represented by other parties to the proceeding, and particularly by the Trustee under the mortgage, and that such changes as were made in the Plan were made either by the representatives of the Debtor, who proposed the initial Plan, or at the instance of other parties than the Petitioners."

The statement that the class which was represented by the Trustee on the hearings concerning the inequitable Plan of 1935, is false because at page 23 of their Brief they say that this Trustee *first intervened* before the Commission on June 16, 1937, and the hearings on the 1935 Plan were *closed before that date*. The objections to the 1935 Plan were heard in 1935, and the hearings are contained in Volumes I and II *prior to the appearance of the Trustee*. The alleged other parties in interest are (1) the Institutional Investors Group and (2) Thomas Wolstenholme Sons & Company, as is specifically stated at page 22 of their Brief. The Institutional Group *spon-*

sored the Debtor's Plan of 1935 which was *opposed* by the Petitioners, so that *this group could not very well have represented the class which opposed the Plan.* The other group merely obtained an intervention, but *did not participate in the hearings.* The entire record, Volumes I to V inclusive, is before this Court, and the *Respondents have not been able to point to one page of the record where this group took any position.* All that they point to in the record (p. 23) is that the Commission mentioned that they intervened. *The mere intervention of a party, without participation in the hearings, does not become a representation of a Class.*

Respondents say (p. 20) that on June 16, 1937, "it was recognized that at the time the 1935 Plan was proposed one possible defect therein was the cumulative interest feature of certain mortgage bonds, the seriousness of which could be determined only by future developments", and that a witness appeared on behalf of the Debtor who advanced the suggestion that a "limited cumulative feature could probably be devised" and "at the same time prevent the accumulations reaching a point where they would materially distort the capitalization". *Where is the evidence in the record that this change of heart by the very people who first sponsored the Plan was not brought about by the evidence, cross-examination, and argument as brought out by Petitioners when the Plan was assailed?* They fail to point to any such evidence. The statement (p. 21) that "it is clear" that "this matter of cumulative interest was one that was considered from the *beginning,* not only by the Debtor but by the Institutional Investors" is completely false and is *refuted by the record,* it appearing therefrom that both the Debtor and the Institutional Investors sponsored the Plan in the face of the objections then urged by the Petitioners.

The statement (p. 21) that "the Voting Trust was originally proposed by the Institutional Investors Group" and that "*the Debtor objected to the Voting Trust*" is but a *half-truth*. The record shows that the Debtor *proposed* the Voting Trust (Vol. I, p. 33), and at the hearings on the Plan *its witnesses supported the Voting Trust*. The only one that opposed it were the Petitioners. The Debtor did *later* change its position. *This is the half-truth*. The further statement that the Trustee of the Adjustment Mortgage Bonds objected to the Voting Trust is also a half-truth because the Trustee appeared on the scene *subsequent* to June 16, 1937, and *after* the Petitioners opposed the Voting Trust.

IV.

Jurisdiction to Fix Nothing As a Maximum.

Counsel do not discuss the authorities cited in the Petition on the Point that "nothing" is not synonymous with "maximum", and that authority to fix a "maximum" cannot be stretched to fixing "nothing" as a maximum. They cite the decision of this Court in *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382. This decision holds that the allowance of fees calls for a judicial determination and *sound discretion*. If a Commission can fix "nothing" as a "maximum", then the Court is deprived of its judicial functions. It was not the intent of Congress to deprive the Courts of their functions when they conferred the authority on the Commission to *fix* the maximum and the authority on the Courts to make the *allowance* within the maximum. It is evident that the final step, the allowance, was vested in the Courts and not in the Commission, and the Administrative Body was powerless to curtail the function of the Court.

In *City of Yonkers* v. *Int. Com. Com., supra,* this Court said (p. 330):

> "Congress has not left that question exclusively to administrative determination; it has given the Courts the final say".

The construction placed on the statute in the instant case tends to violate the language of the statute and to remove the final "say" from the Courts, and to vest such final determination in the administrative agency.

V.

The Unwarranted Assumption That the Commission Was Familiar With the Facts and That This Constitutes the Substantial Evidence Was Not Justified By the Record.

In answer to the Point that the Court of Appeals substituted an unwarranted assumption in lieu of substantial evidence, which it was unable to find in the record, Respondents say (p. 23) that "The Court did no such thing, but it did quite properly refer to the fact that the Commission which formulated the Plan, was in a better position than anyone else to know who contributed to it". In addition to the argument as it appears in Petitioners' Brief (pp. 37-40) we will quote from the decision of this Court in *City of Yonkers* v. *Int. Com. Com. Supra,* the following:

> "We are asked to presume that the Commission, knowing the limits of its authority, considered this jurisdictional question and decided to act because of its conviction that the branch line was not exempt by reason of §1 (22). But that is to deal too cavalierly with the Congressional mandate and with local interests which are pressing for recognition."

This Court concluded that the report of the Commission must be reviewed and sustained on "affirmative" findings, and not on "inferences".

CONCLUSION.

Respondents say that Petitioners have had more opportunity than is usually accorded litigants to present their cause. This is a true statement, but the opportunity that was afforded to them was never an opporunity to obtain a review on the merits. We were compelled to appeal the first time on the construction of the Statute. We lost the appeal. We lost the application for the Writ of Certiorari in this Court on the *misconstruction* of the Statute. We were compelled later to seek a rehearing after this Court repudiated the former decision in this case. This rehearing was at first denied. We finally succeeded in getting a rehearing and a reversal, but this led to a mere statement by a District Judge that he read the evidence and that there is substantial evidence to support the report, and we have demonstrated that *there is not even a scintilla of evidence,* and this is *confessed* by Respondents' Brief. The Court of Appeals sustained the ruling below, and we have demonstrated in our brief that there is nothing in the record to support its conclusion, and that it is based on *unwarranted assumptions* instead of substantial evidence.

We are compelled again to seek a review from this Court. The best answer to Respondents' conclusion that we can give is the quotation from Proverbs: "Seven times may the righteous fall, but he will rise up again", and that justice will finally triumph.

For the foregoing reasons we urge the issuance of the Writ.

MEYER ABRAMS,
Counsel for Petitioners.

MOTION FOR LEAVE TO FILE COPY OF BRIEF AND PETITION FOR REHEARING FILED BELOW.

Now come Israel A. Abrams, et al., Petitioners herein, by their counsel, and move for leave to file instanter a copy of Petitioners' Brief and Petition for Rehearing in Case No. 8366 filed below, for the purpose of supporting the statements contained in the Reply Brief and to refute the statements contained in Petitioners' Brief as discussed in the Reply.

MEYER ABRAMS,
Counsel for Petitioners.

State of Illinois,
County of Cook—ss.

Meyer Abrams, being first duly sworn on oath, deposes and says that he is the attorney for the Petitioners in the above entitled cause.

Affiant further states that the Brief and Petition for Rehearing which is presented for filing in connection with the above motion is a true and genuine copy of the original Brief and Petition for Rehearing wihch is on file in the United States Circuit Court of Appeals for the Seventh Circuit in Case No. 8366, which is the subject matter of the Petition for Writ of Certiorari.

MEYER ABRAMS.

Subscribed and sworn to before me this 24th day of January, A. D. 1944.

YETTA M. GERTLER,
Notary Public.